No. 17-312

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RENE SANCHEZ-GOMEZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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As the government's opening brief explains, the Ninth Circuit disregarded the statutory and constitutional limitations on its authority when it invalidated the security policy adopted by the judges of the Southern District of California. Respondents have now largely abandoned the Ninth Circuit's own rationale for appellate review—the asserted power to issue a "functional class action" writ of supervisory mandamus—in favor of rationales that even the Ninth Circuit did not accept. But no rationale justifies the decision below.

Although the Ninth Circuit recognized that it could not assume jurisdiction over respondents' appeals under the collateral-order doctrine, respondents now rely on that doctrine as the primary justification for the court's review. In order to do so, respondents have reconceived of their challenges as freestanding invocations of the right to "dignity" and "liberty," disconnected from any effect on their actual criminal cases. But if

that framing were accepted, nearly any trial-court ruling regarding courtroom management would be subject to an interlocutory appeal, and the collateral-order exception would effectively swallow the final-judgment rule.

Respondents' fallback defense of the Ninth Circuit's mandamus reasoning is similarly flawed. Respondents do not, and could not, assert clear error or abuse of discretion by the district court. Instead, respondents argue (Br. 44) that mandamus was proper because the district court's exceeding of its authority became clear "once the question [was] resolved" by the Ninth Circuit. But even the Ninth Circuit did not take such a sweeping view of its mandamus power—a view that would upend traditional mandamus principles.

In any event, even if a statutory mechanism for appellate review could be found, respondents' challenges to the security policy became moot under Article III once their criminal cases ended. Respondents do not defend the Ninth Circuit's novel "functional class action" exception to mootness. And their own invocation of the exception for cases "capable of repetition, yet evading review" not only relies on extra-record evidence (Resp. Br. App. 1a-36a), but also cannot be squared with this Court's repeated refusal to apply that exception to a litigant's pronouncement of his own future criminality. Respondents may strongly oppose the Southern District's security policy, which they incorrectly portray (Br. 5-9) as having been applied unjustly. See Cert. Reply Br. 5-6. But that opposition cannot vest the Ninth Circuit with adjudicatory powers in excess of its statutory and constitutional authority.

A. No Statute Authorizes Interlocutory Review Of The District Court's Orders

1. The district court's orders were not "final decisions" under the collateral-order doctrine

The Ninth Circuit correctly recognized that respondents' claims were not appealable under the collateral-order doctrine. Pet. App. 6a-7a; see Pet. Br. 17-27. If their claims are challenges to a criminal procedure, they were reviewable in a postjudgment appeal; otherwise, they are conditions-of-confinement claims that would be the appropriate subject of a separate civil suit. In neither case could the district court's interlocutory orders be deemed "final decisions" under 28 U.S.C. 1291.

a. The collateral-order doctrine permits an interlocutory appeal only when the challenged ruling is, *inter alia*, "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (citation omitted). Respondents do not meaningfully dispute that, to the extent their challenges present questions of criminal procedure, interlocutory review under the collateral-order doctrine is unavailable.

Like other challenges to the procedures followed in criminal proceedings, including the challenge to the use of physical restraints at sentencing in *Deck* v. *Missouri*, 544 U.S. 622 (2005), respondents' challenges to the security policy here could be resolved following final judgment. See *Estelle* v. *Williams*, 425 U.S. 501 (1976) (postconviction review of challenge to prison clothing at trial). If respondents must show prejudice in their criminal cases to prevail on their claims, then the claims' "validity cannot be adequately reviewed until trial is complete," *Flanagan* v. *United States*, 465 U.S. 259, 268 (1984). Alternatively, if "no showing of prejudice to

[the] defense" is required, reversal may readily be obtained after final judgment, *ibid.* Either way, the proper method for challenging the procedures followed in their criminal cases is an appeal of the judgments in those cases. See Pet. Br. 21-23.

b. Respondents contend (Br. 21), for the first time in this Court, that their due process claims are "independent of any effect" that the Southern District's security policy might have "on the fairness of procedures used to determine guilt or innocence." But nothing in the Court's decisions allows a defendant to expand the availability of interlocutory review by redefining the scope of the right invoked. *Deck* identified "three fundamental legal principles" that underlie a defendant's due process right to be free from physical restraints. 544 U.S. at 630. One of those principles was "the accused's ability to communicate with his lawyer," an interest rooted in prejudice-based concerns about the right to "a meaningful defense" against criminal charges. *Id.* at 631 (citation and internal quotation marks omitted). Respondents cannot seek collateral-order review based on two-thirds of a due process claim.

Respondents' current characterization of their claims also cannot be squared with the merits argument that they have advanced throughout this litigation. In the district court (J.A. 425-427), in the court of appeals (Resp. C.A. Br. 23-25), and in this Court at the certiorari stage (Br. in Opp. 33), respondents argued that the security policy violates due process in substantial part because it undermines the ability of criminal defendants to communicate with counsel and to participate in their own defense. Even now, respondents argue (Br. 31) that the policy "deprives defendants" of "the ability to meaningfully participate in their own defense," as a reason why interlocutory review should be available.

Respondents have, moreover, explicitly relied on concerns of prejudice to distinguish their claims from conditions-of-confinement claims that would be brought outside the context of criminal proceedings. See Br. in Opp. 33 ("The need to protect these interests distinguishes the courtroom from the jail. That is why Petitioner and the dissent are wrong to look to *Bell v. Wolfish*."). They cannot now assert (Br. 21) that their challenges in fact involve only claims of "freedom, respect, and dignity" that are independent of criminal procedure.

c. Allowing an interlocutory appeal in these circumstances would dramatically expand the collateral-order doctrine's "narrow exception to the normal application of the final judgment rule." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989). Respondents argue that an immediate appeal was necessary here to vindicate such intangible interests as "freedom, respect, and dignity," Resp. Br. 21; "the dignity and decorum of the court," *id.* at 30; and "the critical public perception that courts are magisterial institutions," *id.* at 31. Yet nearly any challenge to a courtroom procedure, when untethered to concerns about its potential effect on the case's outcome, can be recharacterized as an attempt to promote those same values.

A criminal defendant's right to self-representation, for instance, exists in part "to affirm the dignity and autonomy of the accused," *McKaskle* v. *Wiggins*, 465 U.S. 168, 176-177 (1984), and other rights can be described as advancing the same interests, see, *e.g.*, Resp. Br. at 9, *United States* v. *Gonzalez-Lopez*, 548 U.S. 140 (2006) (No. 05-352) (asserting that right to counsel of choice promotes "autonomy and dignity"). The right to a public trial likewise "furthers interests other than protecting the defendant against unjust conviction," including

promoting "respect for the justice system" and perceptions of fairness among "the public at large." *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1910, 1913 (2017). And the right to a speedy trial seeks "to prevent oppressive pretrial incarceration" and thus "to minimize anxiety and concern of the accused." *United States* v. *MacDonald*, 435 U.S. 850, 858 (1978) (citation omitted). Respondents' argument would thus suggest a mechanism for asserting those rights (and many others) in an interlocutory appeal, in direct conflict with this Court's repeated refusal to "expand[] the small class of criminal case orders covered by the collateral-order exception." *Flanagan*, 465 U.S. at 269; see, *e.g.*, *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982) (per curiam); *MacDonald*, 435 U.S. at 861-863. As the Court has recognized, the "costs of such expansion are great, and the potential rewards are small." *Flanagan*, 465 U.S. at 269.

The implications of respondents' argument would still be troubling, moreover, even if the argument could be limited to appeals of decisions regarding pretrial restraints. According to respondents, any pretrial detainee who disagrees with the use of restraints against him may file an immediate interlocutory appeal. Respondents have been silent about whether, when such an appeal is taken, proceedings in the district court must be halted until the appeal is resolved, but their merits brief strongly suggests that a stay would be required. See, *e.g.*, Resp. Br. 21 ("The loss of this liberty is effectively unreviewable on appeal after trial and sentence."); *id.* at 22 ("No post-judgment appeal can return it to her."). The inevitable result would be to undermine the final-judgment rule through routine "delays and disruptions attendant upon intermediate appeal[s]," which "are especially inimical to the effective and fair administration of the criminal law." *DiBella* v. *United*

States, 369 U.S. 121, 126 (1962); see *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940) ("[E]ncouragement of delay is fatal to the vindication of the criminal law.").

d. Even assuming respondents could excise the prejudice aspect of their challenges, the collateral-order doctrine would still not support an interlocutory appeal.

As an initial matter, respondents' current efforts to preserve an appellate decision that was *itself* a post-conviction ruling essentially concede that their claims—no matter how they are viewed—were not "effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand*, 437 U.S. at 468. The Ninth Circuit resolved respondents' due process challenges only after their criminal cases had ended. Although respondents invoked interlocutory review by appealing from pretrial rulings rather than from final judgments, the panel decision was issued nearly a year after three respondents had pleaded guilty and charges had been dismissed against the fourth. See Pet. Br. 31-32. As a functional matter, therefore, respondents were in substantially the same position that they would have been in had they appealed from a final judgment.

In any event, absent any argument about prejudice to their criminal proceedings, respondents are simply challenging the conditions of their confinement. Though acknowledging that they may be restrained elsewhere, they are isolating the courtroom as a singular location in which—for reasons unrelated to any effect on the criminal proceedings that occur there—they believe that use of restraints is improper. Such a conditions-of-confinement claim is not the proper subject of an interlocutory appeal in a criminal case. Rather, as this Court's precedents illustrate, such a claim would more appropriately be brought in a separate civil suit. See Pet. Br.

25; see also, *e.g.*, *Florence* v. *Board of Chosen Freeholders*, 566 U.S. 318 (2012); *Bell* v. *Wolfish*, 441 U.S. 520 (1979).

Respondents do not dispute that, by filing such a suit, they could have obtained all the relief they now request. Instead, they argue (Br. 34) that this Court's collateral-order decisions do not say that they "*must* do so." But the very premise of the "collateral-order doctrine" is that it relates to an "order" entered in the context of an existing case. And the only circumstances in which this Court has permitted collateral-order appeals in criminal cases involved orders that were inherently part of that case. See *Sell* v. *United States*, 539 U.S. 166 (2003) (order permitting forced medication for purposes of conducting trial); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (order denying dismissal on Speech or Debate Clause grounds); *Abney* v. *United States*, 431 U.S. 651 (1977) (order denying dismissal on Double Jeopardy Clause grounds); *Stack* v. *Boyle*, 342 U.S. 1 (1951) (order denying bail). Separate litigation of such orders in another suit would potentially have led to conflicts and confusion.

Respondents, in contrast, purport to challenge only a general policy about the circumstances in which restraints will be removed. To the extent their challenge is not a question of the criminal procedures to be followed in their own cases, it is a challenge that any criminal defendant in the Southern District could have brought. See Resp. Br. 1 (noting that respondents were among "[n]umerous defendants" who raised similar challenges). It is therefore not one that must be addressed in an appeal in a particular criminal case.

As explained in the government's opening brief (at 24), the civil process offers a superior mechanism for facilitating factual development and for authorizing appro-

priate preliminary or permanent injunctive relief. Respondents argue (Br. 34) that a separate civil suit might undermine "comity between district court judges" if it resulted in injunctive relief "prohibiting * * * fellow district court judges from shackling defendants in cases pending before them." But any injunction would run against the United States Marshal, who oversees the deputy marshals applying physical restraints to criminal defendants, not the judges of the Southern District.

Respondents also err in relying (Br. 35) on *Stack* for the proposition that "initiating new proceedings is inappropriate." Applying age-old exhaustion principles specific to the habeas context, *Stack* explained that a district court "should withhold relief in [a] collateral habeas corpus action where an adequate remedy available in the criminal proceeding has not been exhausted." 342 U.S. at 6-7 (citing *Ex parte Royall*, 117 U.S. 241 (1886)). The Court did not suggest that a defendant may not file a separate civil suit raising claims *unrelated* to the substance of the defendant's own criminal proceedings, such as conditions-of-confinement claims.

e. Respondents are mistaken in their attempts (Br. 22-25) to analogize their due process claim to the four categories of claims that this Court has recognized as collaterally appealable in criminal cases.

Two of the existing categories involve an explicit textual constitutional right not to be tried at all. See *Helstoski*, 442 U.S. 500 (Speech or Debate Clause); *Abney*, 431 U.S. 651 (Double Jeopardy Clause). Respondents suggest (Br. 25) that their own due process claims are comparable, in that "it is possible to characterize the right Respondents assert as one to avoid proceedings while shackled." But *any* objection to a trial procedure can be described as the right "to avoid proceed-

ings while [that procedure is employed]." And respondents' assertion of "'personal strain' and 'public embarrassment,'" *ibid.* (quoting *Abney*, 431 U.S. at 661), does not differentiate them from the mine run of defendants who must await final judgment before seeking appellate review. Even as to most defendants who seek to avoid trial altogether, the Court has explained, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick*, 309 U.S. at 325; see *Hollywood Motor Car*, 458 U.S. at 270 (no interlocutory appeal for denial of motion to dismiss for prosecutorial vindictiveness); *MacDonald*, 435 U.S. at 863 (no interlocutory appeal for denial of motion to dismiss under Speedy Trial Clause).

Respondents' challenges are no more analogous to the final two categories in which interlocutory appeals have been permitted. In *Sell*, the question was whether to permit the forced administration of antipsychotic drugs to render the defendant competent for trial. 539 U.S. at 175. The Court applied the collateral-order doctrine based primarily on its understanding of "the severity of the intrusion," but only after the Court determined that the defendant's challenge did not raise any "questions concerning trial procedures." *Id.* at 176-177. Respondents' objection to the security policy, by contrast, concerns a routine matter of courtroom management; even respondents do not claim that the use of restraints—to which thousands of defendants are subject daily in court proceedings across the country—involves a physical intrusion as severe as the one at issue in *Sell*. Indeed, respondents do not dispute that restraints may be used as soon as they step outside the courtroom, whereas the defendant in *Sell* argued that antipsychotic drugs could *never* be administered against his will.

Nor are respondents' due process claims like the excessive-bail claims at issue in *Stack*. Bail claims, unlike respondents' claims, derive from an explicit textual constitutional guarantee. See *Stack*, 342 U.S. at 5. And bail claims, unlike respondents' claims, involve an interest in liberty outside the context of courtroom proceedings. A defendant seeking bail thus asserts a right that could not be vindicated through fresh proceedings that utilize different procedures, and they necessarily "can be reviewed without halting the main trial," *id.* at 12 (Jackson, J., concurring); see *Hollywood Motor Car*, 458 U.S. at 265 (noting that Justice Jackson authored the decision recognizing the collateral-order doctrine). Respondents' claims have neither of those features.

2. Respondents' challenges do not satisfy the criteria for a writ of mandamus

In seeking to defend the Ninth Circuit's decision as a proper exercise of the mandamus power under the All Writs Act, 28 U.S.C. 1651(a), respondents largely repeat the Ninth Circuit's own errors. "[T]his Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal." *Will* v. *United States*, 389 U.S. 90, 98 (1967). Respondents offer no sound reason to make this case—which satisfies none of the three traditional prerequisites for mandamus relief, see Pet. Br. 27-30—the first and only exception.

a. Respondents had "other adequate means" to obtain relief. *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380 (2004) (citation omitted). Respondents assert (Br. 42) that "a court deciding an appeal after final judgment [would be] powerless to provide [them with a] remedy." But as explained previously, respondents appear to view the post-conviction appellate decision below as adequate,

and they could have sought a similar decision in an appeal from the final judgments in their criminal cases. See p. 7, *supra*.

Also as explained above, if respondents are correct (Br. 41) that their challenges to the security policy "do not bear on the outcome of [their] individual court proceedings," then those challenges would more appropriately have taken the form of separate civil suits. Respondents err in suggesting (Br. 42) that *Mallard* v. *United States District Court*, 490 U.S. 296 (1989), allows a writ of mandamus to substitute for a civil suit challenging the conditions of pretrial detention. In *Mallard*, the Court found mandamus review appropriate where, *inter alia*, the petitioner—an attorney forced to represent indigent plaintiffs—"had no alternative remedy available to him." *Id.* at 309. The Court did not discuss whether, as respondents here suggest (Br. 42), the attorney "could have pursued further review in separate contempt or bar proceedings." And even assuming the Court considered that issue *sub silentio*, a conclusion that the lawyer in *Mallard* did not need to expose himself to separate sanctions (contempt or bar censure) as the price of appellate review would not apply in the circumstances here. Not only would the filing of a civil suit expose respondents to no additional risks, but it would provide a superior vehicle for addressing their claims.

b. Respondents additionally cannot show that their "right to issuance of the writ is clear and indisputable." *Cheney*, 542 U.S. at 381 (citations and internal quotation marks omitted). The district court, in rejecting respondents' due process claims, relied on the Ninth Circuit's prior decision in *United States* v. *Howard*, 480 F.3d 1005 (2007), which in turn had relied on this Court's statement in *Deck* that the common-law rule against

physically restraining criminal defendants "did not apply at 'the time of arraignment,' or like proceedings before the judge." *Id.* at 1012 (quoting *Deck*, 544 U.S. at 626). The district court's adherence to applicable Supreme Court and circuit precedent did not amount to "clear" error justifying mandamus review.

Respondents argue (Br. 27-29) that this Court misread the common law in *Deck*. As the government has previously explained (Cert. Reply Br. 6-8), respondents' efforts to relitigate the relevant portion of *Deck* lack merit. But even if respondents ultimately had the better of the argument, that would not show that the district court committed "clear and indisputable" error by refusing to disagree with this Court. Cf. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (explaining that lower courts should "leav[e] to this Court the prerogative of overruling its own decisions").

Respondents also assert that "[t]he right to issuance of the writ is 'clear and indisputable' when a lower court acts outside the scope[of]its discretion or jurisdiction *once the question is resolved.*" Resp. Br. 44 (emphasis added). But that contradicts the plain meaning of the phrase "clear and indisputable" and would substantially undermine the requirement as a meaningful limitation on mandamus relief. Any legal issue is clear *after* it has been decided by a higher court. Yet this Court has cautioned that mandamus review "does not run the gauntlet of reversible errors." *Will*, 389 U.S. at 104 (citation and internal quotation marks omitted).

Respondents' proposed approach to mandamus review would also require an appellate court to fully resolve the merits of a mandamus petition in every case, because it could not be determined whether the district court committed a "clear and indisputable" error until

the disputed issue had been resolved. This Court, by contrast, has repeatedly declined to wade into disputes where "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." *Parr* v. *United States*, 351 U.S. 513, 520 (1956); see, *e.g.*, *Will*, 389 U.S. at 104 (mandamus not appropriate even though district court "may have erred"); *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 382 (1953) (district court's decision, "even if erroneous," did not justify mandamus).

To support their novel interpretation of "clear and indisputable," respondents again rely (Br. 44-45) on *Mallard*, but their reliance is again misplaced. The Court found mandamus appropriate there because the district court had interpreted 28 U.S.C. 1915(d) to authorize the compulsory assignment of attorneys in civil cases, contrary to the "plain meaning" of the provision. *Mallard*, 490 U.S. at 307; see *id.* at 301 ("The import of the term seems plain."). The statutory language, and the court of appeals' error, were clear notwithstanding that this Court was resolving a circuit conflict, see *id.* at 300; the courts of appeals sometimes disagree even where the language of a statute is clear. See, *e.g.*, *Coleman* v. *Tollefson*, 135 S. Ct. 1759, 1763 (2015) (resolving circuit conflict "[u]nder the plain language of the statute"). At a minimum, nothing in *Mallard* suggests that a court of appeals has identified a "clear and indisputable" error, of the kind required for mandamus review, in a case like this one—which resulted in a decision that deviated from the views of other circuits, departed from the Ninth Circuit's own precedent and from precedent of this Court, and drew a sharp dissent.

c. Finally, respondents have not shown any "exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion" sufficient to

warrant mandamus relief. *Cheney*, 542 U.S. at 380 (citations and internal quotation marks omitted); see *Will*, 389 U.S. at 97-98 (noting that mandamus relief may be appropriate for procedural orders in criminal cases "where the action of the trial court totally deprived the Government of its right to initiate a prosecution, [or] where the court overreached its judicial power to deny the Government the rightful fruits of a valid conviction") (citations omitted). Respondents argue (Br. 47) that exceptional circumstances can exist whenever a district court has misunderstood or failed to apply "the relevant legal standard." Under that capacious definition, even run-of-the-mill legal errors could present "exceptional circumstances" justifying mandamus. This Court has taken a far stricter view. Indeed, the very decision upon which respondents rely (Br. 46-47), *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), illustrates that relief is not available here.

In *Schlagenhauf*, this Court found "unusual circumstances," warranting mandamus review of a civil defendant's "basic allegation" of a "lack of power in [the] district court," where that court had issued an order unlike any other ever issued by a federal court, requiring the defendant to undergo a battery of mental and physical examinations. 379 U.S. at 108-110. The Court emphasized, however, that had the defendant acknowledged the district court's "power to order mental and physical examinations of a defendant in an appropriate case," and argued only that the district court "exceeded that power in ordering examinations" in his own case without a sufficient showing of "good cause," "mandamus [would] not [be] an appropriate remedy, absent, of course, a clear abuse of discretion." *Id.* at 110-111. The Court explained that, although the defendant's "good

cause" argument was reviewable in the "special circumstances" where the defendant's mandamus petition was already "properly before the court [of appeals] on a substantial allegation of usurpation of power," that "good cause" argument would not alone have been enough to warrant mandamus review. *Ibid.*

Here, petitioners do not allege a fundamental "lack of power," *Schlagenhauf*, 379 U.S. at 110, by the district court to maintain them in restraints during their pretrial proceedings. Rather, their challenges involve only an "ordinary situation where the sole issue presented is the district court's determination [of] 'good cause'" to exercise a power the court concededly possesses, *id.* at 111. But in that circumstance, "mandamus is not an appropriate remedy, absent * * * a clear abuse of discretion." *Ibid.* No abuse of discretion, let alone a "clear abuse of discretion," exists here, where the precedents of both the Ninth Circuit and this Court supported the district court's orders.

B. Respondents Cannot Avoid Mootness Through Assertions Of Their Own Future Criminality

Even if a statutory basis existed for appellate review of respondents' claims, any such review became moot upon the conclusion of their criminal cases. See Pet. Br. 31-43. Respondents do not defend the "functional class action" device through which the Ninth Circuit purported to avoid mootness, going so far (Br. 58) as to disavow the term itself. They instead argue (Br. 52) against mootness based solely on the theory that they are "reasonably likely" to commit future crimes within the Southern District, get caught, and face prosecution in proceedings in which restraints will again be used. That theory is untenable.

1. Respondents seek to support their theory (Br. 49-51) through extra-record material showing that, more than a year after they appealed the district court's decision upholding the security policy, respondents Sanchez-Gomez and Patricio-Guzman illegally returned to the United States and were convicted on new criminal charges. See Resp. Br. App. 14a-36a. Respondents also suggest (Br. 52) that this Court should remand the case "to allow further development of the record and a determination" by the court of appeals regarding whether they are likely to commit still more crimes in the future.

Respondents' reliance on illegal-reentry convictions that postdated their appeals does not aid their argument. Because the case-or-controversy requirement "subsists through all stages of federal judicial proceedings, trial and appellate," *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990), a party may not resurrect moot claims on appeal by pointing to events that occurred long after the appeal was filed. Respondents' due process claims became moot when their criminal cases ended and no respondent appealed, with the last final judgment imposed on June 19, 2014. See Pet. Br. 31-32. At that point, their challenges to the security policy should have been dismissed. See *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 669 (2016) (explaining that "the action can no longer proceed and must be dismissed as moot" whenever a litigant lacks a "personal stake in the outcome of the lawsuit, at any point during litigation") (citation and internal quotation marks omitted).

Respondents' claims did not become "unmoot," justifying reinstatement of their appeals, when petitioners Sanchez-Gomez and Patricio-Gomez committed new crimes in 2015 and 2016. See Resp. Br. 50-51. Nor do those additional criminal proceedings—which have now

themselves concluded—suffice to maintain a live controversy in this Court now. Cf. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) (vacating court of appeals' decision when mootness precluded this Court's review).

2. On a more fundamental level, this Court has repeatedly rejected arguments, made to support the existence of a live case or controversy, that are "contingent upon [litigants'] violating the law, getting caught, and being convicted." *Spencer* v. *Kemna*, 523 U.S. 1, 15 (1998); see *Lane* v. *Williams*, 455 U.S. 624, 631-632 & n.13 (1982); *O'Shea* v. *Littleton*, 414 U.S. 488, 496-497 (1974). Respondents cannot distinguish the relevant decisions.

Respondents argue (Br. 56) that, whereas the plaintiffs in *O'Shea* offered only speculation about "future harm," a "less demanding standard" applies to their own assertion that a "past harm" will be repeated. Yet the *O'Shea* plaintiffs *did* allege past harm: several "had actually been [criminal] defendants in proceedings before [city officials] and had suffered from the alleged unconstitutional practices." 414 U.S. at 495. The Court acknowledged that "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." *Id.* at 496. But it nevertheless rejected the argument that mootness could be avoided by the plaintiffs' prediction that they would "(1) violate the law in the future, (2) be arrested for violating the law, (3) appear before the [officials], and (4) be subjected to [the challenged] practices." Resp. Br. 56. That rejected argument is identical to respondents' argument here.

Respondents' argument also conflicts with *Lane*. As respondents note (Br. 57), the Court there found a challenge to lack of notice of a parole condition to be moot in circumstances where custody for the parole violation was already complete and the petitioners were "now

acutely aware" of the condition going forward. *Lane*, 455 U.S. at 626-628, 631, 634. In concluding that no live controversy existed, the Court rejected the argument, raised by Justice Marshall in dissent, that the case was not moot because the habeas petitioners' past "parole violations may be considered in a subsequent parole determination." *Id.* at 632 n.13. That argument, the Court explained, was dependent on the commission of a future crime, and the habeas petitioners "themselves [we]re able—and indeed required by law—to prevent such a possibility from occurring." *Ibid.* The same is true of respondents here.

The Court in *Spencer* similarly found a prisoner's challenge to an order revoking his parole to be moot after his release. As respondents observe (Br. 57-58), the Court rejected the argument that a live controversy persisted because he might again have his parole revoked, explaining, *inter alia*, that he had not "demonstrated a reasonable likelihood that he will once again be paroled and have that parole revoked." *Spencer*, 523 U.S. at 17-18 (citation omitted). But the Court also rejected a separate argument that the controversy remained live because the order of revocation "could be used to increase his sentence in a future sentencing proceeding." *Id.* at 15. Relying on *Lane* and *O'Shea*, the Court explained that a litigant's prediction of his own future criminality was insufficient to establish a live case or controversy. *Ibid.* That principle forecloses respondents' argument here.

3. Respondents separately rely (Br. 52-54) on *Honig* v. *Doe*, 484 U.S. 305 (1988), and *Turner* v. *Rogers*, 564 U.S. 431 (2011). But neither of those decisions involved a litigant who attempted to satisfy the case-or-controversy requirement based on his anticipation of future crimes. In

any event, both undermine, rather than support, respondents' argument.

Honig involved a challenge under the Education of the Handicapped Act (EHA) to a completed school suspension. The Court found the dispute to be "'capable of repetition, yet evading review,'" where a future school suspension was likely in light of "the nature of [the plaintiff's] disability." 484 U.S. at 318 (citation omitted). The Court reaffirmed that, "for purposes of assessing the likelihood that state authorities will reinflict a given injury, [the Court] generally ha[s] been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." *Id.* at 320. But the Court explained that the plaintiff's "very inability to conform his conduct to socially acceptable norms" was precisely what "render[ed] him 'handicapped' within the meaning of the EHA." *Ibid.*; see *id.* at 314 (student was "an emotionally disturbed child" who "was unable to control verbal or physical outbursts and exhibited a severe disturbance in relationships with peers and adults") (brackets, citation, and internal quotation marks omitted). "Given the unique circumstances and context of th[e] case," the Court accordingly found it "reasonable to expect that [the student] w[ould] again engage in the type of misconduct that precipitated th[e] suit." *Id.* at 321.

The Court applied a similar principle in *Turner*, where the petitioner was held in civil contempt five times for failing to make child-support payments that he had no evident means to afford. 564 U.S. at 436. On the sixth occasion, following a hearing at which he had no counsel, he was jailed for 12 months, despite no finding by the judge "concerning [the petitioner's] ability to pay his arrearage." *Id.* at 437. By the time he appeared before this Court, challenging the lack of representation

in his contempt hearing, the petitioner was "$13,814.72 in arrears," with no further indication as to his ability to pay. *Id.* at 440. Under those circumstances, the Court found "a more than 'reasonable' likelihood" that the petitioner would again appear without counsel in a civil contempt proceeding. *Ibid.*

Honig and *Turner* suggest that the "capable of repetition, yet evading review" exception may potentially be applicable when a litigant is unable, based on circumstances effectively beyond his own control, to conform his behavior to the non-criminal legal requirements that he is challenging. Respondents, however, do not claim to be physically or psychologically unable to prevent themselves from committing future crimes. Nor do respondents challenge the law against reentering the country without permission; they challenge the use of restraints in pretrial criminal proceedings generally. Their argument against mootness is accordingly one the Court has been "unwilling" to accept. *Honig*, 484 U.S. at 320.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be vacated.

Respectfully submitted.

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Solicitor General

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